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No. 81-2276

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

VS.

UNITED STATES OF AMERICA AND
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

REPLY BRIEF OF PETITIONER TRUCKEE-CARSON IRRIGATION DISTRICT

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ARGUMENT

I.

Res Judicata Bars This Action

A. There Is No Legal Or Factual Support for The United States' Contention That It Can "Reallocate" Newlands Project Water Rights to Non-Project Lands for Non-Project Purposes

In an imaginative attempt to circumvent the res judicata problem which it faces in this lawsuit, the United States now characterizes its efforts to relitigate *Orr Ditch* as nothing more than an exercise of the "right" to "change the manner and purpose of use" of *"its"* waters, by "reallocating" water needed for irrigation on the Newlands Project to the Pyramid Lake Indian Reservation for fishery use purposes. Brief for the United States [hereinafter "U.S. Brief"] at 21, 24-27. This contention borders on the frivolous, and disintegrates in the face of even superficial analysis.

The government's brief is notably silent with regard to who may act on behalf of the United States to "change the manner and place of use of" the Newlands Project water —Congress? The Secretary of the Interior? This selective silence is perhaps best explained by the fact that no such decision has ever been made in this case by Congress, the Secretary of the Interior, or anyone else. Nor does the complaint filed in this action by the United States reflect any desire or attempt by the United States to change the manner or place of use of July 2, 1902 priority Newlands Project water rights to the Pyramid Lake Indian Reservation. *See* Nev.App. 151a-159a. Rather, the United States' complaint purported not to affect the rights decreed in *Orr Ditch*, but to secure "additional rights" for the Reservation with a November 29, 1859 priority. Nev.App. 151a-159a. At no time during the proceedings before the District Court or the Court of Appeals did the United States assert its presently purported right to change the manner and place of use of water rights decreed for irrigation of Newlands Project lands to fishery flows for Pyramid Lake. This *post hoc* rationalization did not surface until the United States filed its responding brief with this Court.

On a still more fundamental level, the United States' argument is legally unsupportable, for it is necessarily premised on the erroneous assumption that the United States owns the water rights appurtenant to project lands, despite the determination by the United States District Court for the District of Nevada that the Newlands Project farmers own these water rights:

> The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. These rights have a priority of July 2, 1902. The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lien-holder's

interest to secure repayment of the project construction costs.

United States v. Alpine Land & Reservoir Co., et al., 503 F.Supp. 877, 879 (D. Nev. 1980), *aff'd* 697 F.2d 851 (9th Cir. 1983).

The District Court's decision was based on *Ickes v. Fox*, 300 U.S. 82 (1937), a case indistinguishable from the case at bench insofar as the issue of ownership of reclamation project lands' water rights is concerned. In *Ickes* this Court squarely held that the project farmers own the water rights appurtenant to their irrigable lands, and that the United States' interest is limited to that of a lienholder:

> Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. *Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.* Compare *Murphy v. Kerr* (D.C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*Id.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefore, it was provided that the government should have a lien upon the lands and the water rights appurtenant thereto—a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner. (Emphasis added.)

300 U.S. at 94-95. Thus, while the *Orr Ditch* Final Decree awarded the United States the right to divert certain quantities of Truckee River waters for use on Newlands Project lands, the decree did not adjudicate, as between the United States and the project farmers, the *ownership* of the project water rights. See *Orr Ditch* Final Decree at TCID App. A-248.

The bottom line in this case is that the project water rights were appropriated for the use of the project farmers, and they, not the government, own these water rights. In fact the project farmers *purchased* these water rights from the United States.[1] The United States took their money, and its contention that it is now privileged to "change the manner and place of use" of these project

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[1]The project farmers acquired their water rights by at least four different devices. During the period prior to December 18, 1926, some project farmers acquired their rights by submitting a "Water Right Application" to the Secretary of the Interior. Exh. B-533(c), RT 7356. The application required that the project farmer pay the United States a specified sum for the water right, which was appurtenant to the irrigable land described therein. *Id.* In other instances the project farmers acquired their water right by patent; the water right was conveyed to the project farmer with the land. Exh. B-533(a), RT 7355. Finally, "Agreements" were used in instances involving original settlers who had prior vested water rights on the Carson River, whereby they conveyed their prior vested water rights to the United States *in exchange* for the United States' agreement to provide them with project water. *See* Exh. B-533(b), RT 7355.

After TCID took over the operation of the project on December 18, 1926, project farmers thereafter acquired their water rights by an "Application For Permanent Water Right" which was submitted to and approved by TCID and then by the United States. Exh. B-533(d), RT 7357. Such applications required that the project farmer pay the United States a specified sum for the water right, which was appurtenant to the irrigable land described in the application. *Id.*

water rights to non-project land for non-project purposes is meritless.

Assuming *arguendo* that this Court were to find merit in the United States' implicit claim that it, rather than the project farmers, owns the water rights in issue, its claim of right to change the manner and place of use from the Newlands Project lands to the Reservation would be fully foreclosed by the terms of the *Orr Ditch* Final Decree, which states that the Truckee River Agreement is ". . . approved, adopted by the Court and made a part of the decree and shall be binding as between the signatory parties to said agreement." Nev.App. 143a-144a. Both Truckee-Carson Irrigation District (hereinafter "TCID") and the United States are signatory parties to the agreement, TCID App. A-111, A-176, and contrary to the United States' statement, U.S. Brief at 33-34 n.29, TCID *did* acquire water rights in its own name by the terms of the Truckee River Agreement. TCID App. A-152-A-153. The United States was decreed the right to divert Truckee River water for use on the Newlands Project, but those rights were *allocated by the Agreement* to ". . . the Irrigation District [TCID], for use upon the Carson and Truckee Divisions of the Newlands Reclamation Project . . ." TCID App. A-152.[2] Any inconsistency between the allocation to the United States in the decree and the allocation to TCID in the Truckee River Agreement must be resolved in favor of the latter, for the last paragraph in the *decree* states ". . . the rights of the United States shall be as herein adjudicated as of the date of this decree [September 8, 1944] *save only as the same may be affected by said Truckee River Agreement.*" (Emphasis added.) TCID App. A-253.

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[2]The Truckee River Agreement also gave TCID the right under specified circumstances to use Truckee River waters "for its own purposes." TCID App. A-153.

Certainly the Truckee River Agreement's *allocation* of those waters to TCID for use on the Carson and Truckee Divisions of the Newlands Reclamation Project abrogated any right which the United States might otherwise have had to change the manner and place of use of those waters to non-project lands for non-project purposes.

Finally, as both the United States and the Tribe have observed, this Court held in *California v. United States*, 438 U.S. 645 (1978), that Section 8 of the Reclamation Act, 43 U.S.C. § 372, requires the Secretary to follow the provisions of state law in the *appropriation* of water under the Reclamation Act. *See* U.S. Brief at 18; Brief of Pyramid Lake Paiute Tribe of Indians as Respondent [hereinafter "Tribe Responding Brief"] at 5-6. Logically, *California v. United States* must be read to dictate that state law must be followed in changing the manner and place of use of the project water rights as well.

The Ninth Circuit Court of Appeals has so held in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 857-858 (9th Cir. 1983). In the case at bench, no one can seriously dispute that the transfer of the project water rights to the Pyramid Lake Indian Reservation would conflict with the existing rights of the project farmers. Under these circumstances the transfer would be contrary to and in fact precluded not only by the decree, Nev.App. 149a, but also by applicable state law, which provides that an application for a change in the manner or place of use which "conflicts with existing rights" must be rejected. Nev. Rev. Stat. 533.370.[3]

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[3]One other aspect of the United States' "reallocation" argument requires a reply. The United States refers to the Ninth Circuit Court of Appeals' recent affirmance of the district court's judgment in *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980), *aff'd* 697 F.2d 851 (9th Cir. 1983), which confirmed a Carson River water duty on Newlands Project lands of 3.5 acre

Legal niceties notwithstanding, the United States' latest rationalization should also be examined in the light of historical facts. Shortly after the turn of the century, in order to develop the West, the United States urged settlers to move to Nevada and purchase land and water rights from the federal government. Thousands of people responded, came to Nevada, and purchased their land and water rights from the government. They did not buy "farms"; they bought barren land and created farms with their labor. Now, more than half a century later, the United States contends that they have no water rights and that the water rights that the government purported to "sell" them are instead still owned by the United States government, to

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feet per acre for the bottomlands and 4.5 acre feet per acre for the benchlands. *See* U.S. Brief at 5-6 n.4. This is the same water duty that was determined in the *Orr Ditch* Final Decree. The *Alpine* court's determination of water duty was based on reasonable beneficial use, a fact which the United States has chosen to ignore. Section 8 of the 1902 Reclamation Act makes it clear that the overriding principle of reclamation water rights is that ". . . *beneficial use shall be* the basis, *the measure*, and the limit *of the right*." 32 Stat. 390, 43 U.S.C. § 372; emphasis added. This controlling express Congressional directive, *see California v. United States*, 438 U.S. 645, 677 (1978), defines the outward limits of the discretion which the Secretary of the Interior may exercise in administering reclamation projects, and every court which has considered the question has so held. *See, e.g., Ickes v. Fox*, 300 U.S. 82 (1937); *Fox v. Ickes*, 137 F.2d 30 (1943); *Lawrence v. Southard*, 192 Wash. 287, 73 P.2d 722 (1937).

Contrary to the suggestion made by the United States, the uncontradicted evidence in this case shows that a 3 acre foot water duty was never used. RT 7310-7311; *see also, United States v. Alpine Land & Reservoir Co., supra*, 697 F.2d at 856. Further, the uncontradicted evidence shows that there has never been an attempt to apply a 2.92 acre foot water duty on the project. RT 1614, 7300. While in water-short years the actual water duty has been less than the allowable beneficial use of 3.5 and 4.5 acre feet per acre, that is the result of a limited water supply, and in those years the water shortages are shared equally by the project farmers. RT 7246.

be used by it on non-project lands for non-project purposes. Such an arbitrary turnabout is preposterous, if not fraudulent.

B. The Actual "Adversity" Between TCID and the Reservation Is Manifest in the Facts Concerning the Truckee River Agreement, Which Shows All Parties' Intent That the Orr Ditch Final Decree Should Preclude All Future Claims for Truckee River Waters

In its opening brief TCID stated that the Truckee River Agreement had "vitality independent of the force of the *Orr Ditch* Final Decree," Brief of Petitioner Truckee-Carson Irrigation District [hereinafter "TCID Brief"] at 43, which was intended to mean that the *Orr Ditch* Final Decree had the attributes of a contract as well as those of a judicial act. The Decree was the product of a stipulation, and the events which led to its entry, specifically the Truckee River Agreement (which included the Stipulation For Entry of Final Decree with Final Decree annexed thereto), show that all of the parties to the stipulation, including the United States and TCID, intended the Decree to be res judicata and to bar all future Truckee River water right claims. The intentions of the parties to the Truckee River Agreement are highly relevant to the inquiry into the res judicata effect to be given to the *Orr Ditch* Final Decree, "since consent decrees and orders have many of the attributes of ordinary contracts, [and] they should be construed basically as contracts. . . ." *U.S. v. ITT Continental Baking Company*, 420 U.S. 223, 236 (1975); *see generally*, 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4443 at 381-391 (1981).

The Truckee River Agreement was negotiated after the trial of the *Orr Ditch* case, while the Special Master's recommended Temporary Restraining Order was in effect.

The evidence showed, and the district court found, that the Truckee River Agreement was the result of good faith negotiations, TCID App. A-102, in which TCID represented its and the project farmers' interests while the United States represented the Indians' interests. See TCID Brief at 9-12.

The Stipulation For Entry of Final Decree which resulted from the Truckee River Agreement negotiations was signed by T. A. Walters, First Assistant Secretary of the Department of the Interior, on behalf of the United States; by George B. Miller and H. W. Emery, on behalf of TCID; and by Washoe County Water Conservation District, Sierra Pacific Power Company, and parties representing 70% of the total diversion rights within the Washoe County Water Conservation District. Exh. B-500, RT 386-387. Likewise, the form of Final Decree that was annexed to the Stipulation was prepared and approved by TCID and the local interests, and by the United States Attorney General, the Secretary of the Interior, and the Acting Commissioner of the Bureau of Indian Affairs. Exh. G-17, RT 326-327; Exh. U-310, RT 1048, 1059; Exh. B-360, RT 479-480; Exh. B-365, RT 481-483; Exh. B-368, RT 9162. The Decree set forth verbatim the reserved water rights of the United States for the Pyramid Lake Indian Reservation that had been negotiated and agreed upon in Article XI of the Truckee River Agreement. TCID App. A-158-A-160, A-231-A-233. It further provided

> The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is *hereby forever en-*

> *joined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree* . . . (Emphasis added.)

TCID App. A-247.

When the parties to the Truckee River Agreement specifically provided in the stipulated Final Decree that no one was to claim "any rights" in or to the waters of the Truckee River *"except the rights specified, determined and allowed by [the] decree,"* they obviously intended to dispose of *all* water right claims. If a water right was not specified, determined and allowed in the decree, the parties were "forever enjoined" from "asserting or claiming" it. It is difficult to imagine a clearer expression of intent to preclude any future claims for additional Truckee River waters.

On February 25, 1942, the Chief Engineer of the Bureau of Reclamation certified that Boca Reservoir had been constructed and was available for the storage of water. Exh. B-498, RT 383-384. Shortly thereafter the original Truckee River Agreement and Stipulation For Entry of Final Decree with form of Final Decree attached were withdrawn from escrow and filed with the Clerk of the Court, Exh. B-499, RT 384-385; Exh. B-500, RT 386-387; Exh. B-403, RT 349-350, together with a motion for entry of final decree brought by the United States, *TCID,* Washoe County Water Conservation District, Sierra Pacific Power Company, and the other signatory parties to the Stipulation For Entry of Final Decree. The motion was set for hearing on September 6, 1944. Exh. B-512, RT 406.

The hearings on the Motion For Entry of Final Decree were held before Judge Norcross[4] on September 6, 7, and

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[4]The Tribe and the United States now suggest that Judge Norcross' entry of the final decree was improper. U.S. Brief at 39; Tribe Responding Brief at 13. But their claim is without merit, for the record shows that the parties knew of the facts based upon which Judge Norcross might have been disqualified, and all parties agreed to proceed with him. The record also shows that the Reservation's claim suffered no prejudice from Judge Norcross' having heard the motion for entry of the stipulated decree. Following are the relevant facts.

In the early 1920's, prior to his appointment to the bench, Judge Norcross represented two defendant water users in the *Orr Ditch* proceedings before the Special Master, and he argued unsuccessfully against the government's claim of a reserved water right for the Reservation with an 1859 priority. The proceedings before the Special Master terminated in 1925. Exh. B-487, RT 371-372. In 1928 Judge Norcross was appointed to the federal bench. *In September of 1944* the motion for the entry of the stipulated decree was to be heard. *Prior to that hearing* the question of the judge's possible disqualification was discussed by the various attorneys for the various parties, including the United States Attorney, who advised the Attorney General that there was no intention on the part of the attorneys for the major parties to disqualify Judge Norcross. JA 479; Exh. B-416, RT 9162.

There is nothing in the record to indicate that the Attorney General felt that disqualification was in order. Judge Norcross proceeded to hear the motion and enter the stipulated decree as it had been framed by the parties to the Truckee River Agreement. Exh. B-515, RT 407-408.

This was exactly what the attorneys for the United States wanted, from the standpoint of the *Indians*. They recognized that the stipulated decree would be binding on all of the parties who had signed the Stipulation For Entry of Final Decree. Exh. B-413 at 3, RT 9162. However, they also recognized there was *no evidence in the record* to support the additional quantities of water *given to the Reservation* by the Truckee River Agreement, and no evidence at all as to the Reservation benchlands; thus any *Orr Ditch* defendant who had *not* signed the Truckee River Agreement could object to the Reservation's additional water rights, and quite possibly require a reopening of the case not only for the United States, but also for all defendants, who could then relitigate their claims and

8, 1944. At the hearing attorney A. L. Haight appeared for TCID and Roy W. Stoddard,[5] Special Assistant to the Attorney General, appeared for the United States. Exh. B-515 at 1, 10, RT 407-408. Judge Norcross overruled all objections to the entry of the stipulated decree, and on September 8, 1944, it was entered. Exh. B-515 at 210, RT 407-408; Exh. U-336, RT 1048, 1059. Notice of entry of

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present evidence of better priorities and more irrigated acreage. This was a result which the government attorneys wished to avoid. Exh. B-413, RT 9162, Exh. B-417 at 4, RT 9162.

Thus it is plainly apparent that entry of the decree as framed by the parties to the Truckee River Agreement benefitted the Indians. It gave the Reservation more water than the evidence warranted. It is also apparent that the *Orr Ditch* parties made a fully-informed election to proceed with Judge Norcross even though they knew that he had represented two of the private defendants in the case some twenty years earlier. In these circumstances no prejudice to the United States or the Indians can possibly be shown by Judge Norcross' participation in the entry of the decree.

[5]The Tribe and the United States also charge impropriety because the attorney Roy W. Stoddard, who had been appointed as a special assistant to the Attorney General and who represented the United States at the September 8, 1944 hearing when the final decree was entered, had previously represented TCID in the *Orr Ditch* case. U.S. Brief at 40, Tribe Responding Brief at 13.

The actual facts as to Mr. Stoddard's representation of TCID in the *Orr Ditch* case were hardly of a disqualifying nature. He appeared on its behalf on only *one* occasion—a February 13, 1926, hearing to make assessments for payment of the Watermaster's costs. JA 478-479. In the *Orr Ditch* proceedings before the Special Master, Mr. Stoddard represented a number of *other* parties who had a dispute with Sierra Pacific Power Company as to the ownership of water diverted from the Highlands Ditch. This dispute did not impact the United States' water right claims. His last act in representing even those defendants was the preparation of a brief filed with the Special Master on July 1, 1925. *Id.*

On May 15, 1944, well before the hearings on the motion for entry of the final decree, Mr. Stoddard recounted these facts to the Attorney General and inquired as to whether the Attorney General felt he was disqualified to appear as his Special Assistant and present the motion for entry of final decree. JA 476-479. In reply to

the final decree was given on September 14, 1944. Exh. B-516, RT 408-409. There was no motion for new trial and no appeal was taken. Exh. B-517, RT 409-410.

As shown above, the *Orr Ditch* case was resolved by a stipulated Final Decree that was intended by the parties to bar any and all water right claims that were not specified, determined and allowed therein. *TCID itself* was actively engaged in an adversarial capacity in the negoti-

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his inquiry Mr. Stoddard received a letter from J. Edward Williams, Acting Head, Lands Division, Department of Justice, stating that the Department did not consider that he was disqualified to present the motion for entry of final decree on behalf of the government. JA 483-487.

The Tribe and the United States also assert that "as counsel for TCID" Mr. Stoddard opposed a suggestion by Ethelbert Ward that a reserved water right might be sought for 19,000 acres of benchlands on the Reservation. U.S. Brief at 40; Tribe Responding Brief at 22. This statement is inaccurate in several important respects.

First, Mr. Stoddard was no longer TCID's counsel when he wrote the referenced May 26, 1934 letter objecting to Mr. Ward's 19,000-acre proposal. RT 4934-4936; Exh. U-260, RT 1047, 1059. When he wrote that May 26, 1934 letter he was representing the Fernley Valley Water Users Association, not TCID. *See* RT 4883-4884; Exh. B-280 at 6, RT 9162.

Second, Mr. Ward's 19,000-acre suggestion was vastly disproportionate to the conditional right to irrigate 2,635 acres which had been included in the 1926 Temporary Restraining Order, based on Section 26 of the Act of Congress of April 21, 1904, Nev.App. 12a-15a, and was similarly disproportionate to even the Indian Service's own conclusion that only 4,654 acres were practicably irrigable. Exh. U-283 at 13-14, 20, RT 1047, 1059; *see generally*, Exh. U-281, RT 1047, 1059; Exh. U-278, RT 1047, 1059; and Exh. B-308, RT 449-450. Not only TCID but *all* of the local interests opposed Mr. Ward's 19,000-acre suggestion. Exh. U-266, RT 1047, 1059.

The Truckee River Agreement represents the final compromise of these positions. The Indians were given a firm, unconditional reserved water right with an 1859 priority to irrigate 2,745 acres of benchlands, and the water duty for the bottomlands was substantially increased from the water duty that had been recommended by the Special Master.

ations which led to that stipulated decree; it represented the farmers, and the United States represented the Indians. Clearly, adversity between TCID and the Tribe existed in fact, irrespective of the pleadings. Finally, *TCID itself* appeared in the *Orr Ditch* litigation. It signed the Stipulation For Entry of Final Decree that was filed in the appeared in the *Orr Ditch* litigation. It signed the Stipucase, Exh. B-500, RT 386-387, it was one of the movants in the Motion For Entry of Final Decree which was filed in the case, Exh. B-512, RT 406; Exh. B-515 at 10, RT 407-408, and it was even identified as a "defendant" in the government's notice of the signing and entry of the final decree. Exh. B-516 at 2, RT 408-409.

The Tribe and the United States have attempted throughout these appellate proceedings to mischaracterize TCID's position on the Ninth Circuit's "adversity on the pleadings" holding. Contrary to their assertions, TCID does not contend that the requirement of adversity *of claims* is an outmoded technicality which should be abandoned. Such adversity serves the important purposes of insuring that justiciability and due process requirements are met. TCID's argument is that rigid adherence to a litmus test of "paper adversity exists serves no legitimate additional purpose in the administration of justice.

Furthermore, case law clearly demonstrates that *actual* adversity is the applicable criterion, in the establishment of which "adversity on the pleadings" is only one of several factors to be considered. Such *de facto* adversity between all asserted claims is inherently and unavoidably present in a comprehensive water right adjudication like the *Orr Ditch* litigation. TCID Brief at 25-31. And adversity *in fact* did exist between TCID and the Tribe from at least the inception of the Truckee River Agreement negotiations which ultimately produced the settlement of the *Orr Ditch* litigation.

Finally, even "adversity on the pleadings" existed from 1926 forward. The February 13, 1926 Temporary Restraining Order and the *Orr Ditch* Final Decree both *separately* name the Tribe and the Newlands Project, via the United States, *as defendants*. Nev.App. 26a, 36a-37a; Appendix to State of Nevada Reply Brief. In these circumstances, any conceivable requirement of adversity has clearly been satisfied and res judicata bars the Tribe's attempt to relitigate its water right.

II.

The Collateral Estoppel Question May Be Reached by This Court and Should Be Resolved in TCID's Favor

The Tribe asserts that this Court may not consider the collateral estoppel issue raised in TCID's petition for writ of certiorari, because TCID did not bring a protective cross-appeal to challenge the collateral estoppel aspect of the district court's decision. It is true that collateral estoppel was not raised by TCID in the Court of Appeals, other than as an aspect of the general res judicata argument which it urged in support of the trial court's judgment in its favor. But "consideration of issues not . . . presented in the Court of Appeals is not beyond [the] power [of this Court]," and in appropriate circumstances such issues may be addressed. *See, e.g., Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 467 n.20 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 378 n.1 (1970).

The collateral estoppel issue should be addressed here because, like the questions presented by the Court of Appeals' application of the interrelated res judicata doctrine, this aspect of the decision below raises issues important to the efficient administration of justice in the federal court

system, an adequate record for review is before this Court[6], and the parties have briefed the issue. See *Vance v. Terrazas, supra,* 444 U.S. at 258 n.5; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra,* 402 U.S. at 320 n.6; and *Moragne v. States Marine Lines, Inc., supra,* 398 U.S. at 378 n.1.

Because the essential elements of a *Winters* doctrine right, including quantity of entitlement and purpose of the Reservation were adversely and actually litigated in *Orr Ditch*, they cannot be enlarged in this proceeding by relitigation, either against the private parties in the *Orr Ditch* case or against the Newlands Project farmers. *See,* TCID Brief at 34-36, State of Nevada Brief as Petitioner at 40-43.

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[6]Contrary to the Tribe's contention, TCID is not trying to challenge an adverse factual finding made at the district court level but not challenged in the Court of Appeals. Rather, TCID is challenging the legal conclusion which the trial court drew from its factual finding that no evidence on the fishery aspect of the Reservation's *Winters* doctrine claim was introduced during the trial of the *Orr Ditch* case. When the trial court's Finding of Fact number 25 is read in context, it clearly reflects that the court's intent was to state that no "fishery evidence" was presented on behalf of the Reservation's *Winters* doctrine claim during the *Orr Ditch* litigation—*not,* as respondents still urge, that the Reservation had, but failed to litigate, a separate and distinct "*Winters* doctrine *fishery right* claim," as distinguished from its "*Winters* doctrine reserved water right claim." Compare Trial Court's Findings of Fact 23, 24, and 25, TCID App. A-104. The collateral estoppel issue raised by TCID in its petition for Writ of Certiorari is whether the trial court erred in concluding that the Tribe's counsel's failure to present fishery evidence in the trial of *Orr Ditch,* precluded the application of collateral estoppel principles as a matter of law because the fishery aspect of the Reservation's *Winters* doctrine claim had not been "actually litigated." See Conclusion of Law 5 at TCID App. A-108.

CONCLUSION

For the reasons stated above and in TCID's opening brief, the judgment of the Ninth Circuit Court of Appeals should be reversed with respect to TCID, and affirmed in all other respects.

Respectfully submitted,

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